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## Third report on the effects of armed conflicts on treaties

by Mr. Ian Brownlie, Special Rapporteur

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## A. Introduction

1. As a consequence of the exigencies of completing various agenda items, or completing a first reading, experienced by the International Law Commission in the final session of the quinquennium, the results of the first and second reports on the present topic (A/CN.4/552 and A/CN.4/570 and Corr.1, respectively) did not include embarking upon a first reading. Moreover, the second report was limited to a summary of the points made during the debates on the first report in the Commission and the Sixth Committee, respectively. At the fifty-eighth session of the Commission, there was a somewhat perfunctory discussion of the second report.
2. In the circumstances, the first report stands as the definitive study, together with the second report as a supplement. The second report contained no new drafting.
3. In preparing the present report, account has been taken of the useful memorandum prepared by the Secretariat, entitled "The effect of armed conflict on treaties: an examination of practice and doctrine" (A/CN.4/550 and Corr.1 and 2).
4. In the present report, the commentary relies upon cross reference to the first report commentaries.
5. Draft article 6 of the previous reports has been withdrawn.

## B. Draft articles

### Draft article 1

#### Scope

**The present draft articles apply to the effects of an armed conflict in respect of treaties between States.**

#### Comment

6. The provisions of article 1 of the Vienna Convention on the Law of Treaties<sup>1</sup> have been followed (see also article 1 of the Vienna Convention on Succession of States in respect of Treaties<sup>2</sup>). The term "treaty" is defined in draft article 2 below.
7. In the Sixth Committee several delegations expressed the view that the draft articles should apply to articles which were being provisionally applied.<sup>3</sup> The issue can be resolved by reference to the provisions of article 25 of the Vienna Convention itself. There are further complexities but it is not appropriate to set about elaborating the provisions of the Vienna Convention.
8. During the debates at the fifty-seventh session of the Commission, in 2005, the view was expressed that the topic should be expanded by the inclusion of treaties

<sup>1</sup> United Nations, *Treaty Series*, vol. 1155, p. 331.

<sup>2</sup> *Ibid.*, vol. 1946, p. 3.

<sup>3</sup> See comments by the Netherlands (2005), A/C.6/60/SR.18, para. 40; and Malaysia (2006), A/C.6/61/SR.19, para. 48.

entered into by international organizations.<sup>4</sup> Similar views were expressed in the Sixth Committee.<sup>5</sup>

9. The Special Rapporteur is of the opinion that the proposed expansion is based upon a less than mature consideration of the difficulties of "adding on" a qualitatively different subject matter. The United Kingdom expressed the following reservations in the Sixth Committee in 2006:

In relation to the inclusion in the study of treaties involving international organisations, the United Kingdom consider that such treaties are perhaps best not included. As we have commented in relation to the topic of responsibility of international organisations, there is a vast variety of international organisations and their functions. We question whether the specificity of such organisations and their treaty arrangements could be dealt with in this study. Moreover, the issues concerning international organisations and armed conflict may be very different to those arising from States and armed conflict.<sup>6</sup>

10. The Special Rapporteur considers these are considerations which should not be rejected lightly.

## **Draft article 2**

### **Use of terms**

**For the purposes of the present draft articles:**

(a) "Treaty" means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments, and whatever its particular designation;

(b) "Armed conflict" means a state of war or a conflict which involve armed operations which by their nature or extent are likely to affect the operation of treaties between States parties to the armed conflict or between State parties to the armed conflict and third States, regardless of a formal declaration of war or other declaration by any or all of the parties to the armed conflict.

<sup>4</sup> See *Official Records of the General Assembly, Sixtieth Session, Supplement No. 10 (A/60/10)*, para. 129.

<sup>5</sup> See the comments by Morocco (2005), A/C.6/60/SR.11, para. 41; China (2005), A/C.6/60/SR.18, para. 8, and (2006), A/C.6/61/SR.18, para. 44; Nigeria (2005), A/C.6/60/SR.20, para. 47; Jordan (2005), A/C.6/60/SR.19, para. 32, and (2006), A/C.6/61/SR.18, para. 85; Indonesia (2005), A/C.6/60/SR.20, para. 9; Austria (2006), A/C.6/61/SR.18, para. 25; Bulgaria (2006), *ibid.*, para. 20; and Romania (2006), A/C.6/61/SR.19, para. 63. This expansion of the topic was opposed by the Republic of Korea (2005), A/C.6/60/SR.18, para. 31; India (2006), A/C.6/61/SR.19, para. 28; Malaysia (2006), *ibid.*, para. 48; and the United Kingdom (2006), *ibid.*, para. 44.

<sup>6</sup> Summarized in document A/C.6/61/SR.19, para. 44.

## Comment

### Treaty

11. The definition is taken from the Vienna Convention on the Law of Treaties. The meaning and application of the definition is elucidated in the commentary of the Commission in the report of the Commission to the General Assembly in 1966.<sup>7</sup> The definition is adequate for present purposes and, in any case, it is not appropriate for the Commission to seek to revise the Vienna Convention.

### Armed conflict

12. The reader is referred to the substantial commentary included in the first report (A/CN.4/552, paras. 16-24), and the second report (A/CN.4/570 and Corr.1, paras. 8-13). This material is now supplemented in certain respects. In the first place, the division of opinion in the Sixth Committee on the question of including internal armed conflict continued in 2006. The full census is as follows:

(a) States opposed to inclusion: Algeria (2005),<sup>8</sup> Austria (2005)<sup>9</sup> and (2006),<sup>10</sup> China (2005)<sup>11</sup> and (2006),<sup>12</sup> Colombia (2006),<sup>13</sup> India (2006),<sup>14</sup> Indonesia (2006),<sup>15</sup> Islamic Republic of Iran (2005)<sup>16</sup> and (2006),<sup>17</sup> Portugal (2006),<sup>18</sup> and the United Kingdom (a preliminary view) (2006);<sup>19</sup>

(b) States in favour of inclusion: Greece (2005),<sup>20</sup> Japan (2006),<sup>21</sup> Malaysia (2006),<sup>22</sup> Morocco (2005),<sup>23</sup> Nigeria (2005),<sup>24</sup> the Netherlands (2006),<sup>25</sup> Poland (2005),<sup>26</sup> Romania (2006),<sup>27</sup> Sierra Leone (2006)<sup>28</sup> and Slovakia (2005).<sup>29</sup>

<sup>7</sup> *Yearbook of the International Law Commission, 1966*, II, pp. 187-189, paras. 1-8.

<sup>8</sup> A/C.6/60/SR.20, para. 64.

<sup>9</sup> A/C.6/60/SR.18, para. 26.

<sup>10</sup> A/C.6/61/SR.18, para. 25.

<sup>11</sup> A/C.6/60/SR.18, para. 8.

<sup>12</sup> A/C.6/61/SR.18, paras. 45-46.

<sup>13</sup> *Ibid.*, para. 64.

<sup>14</sup> A/C.6/61/SR.19, para. 28.

<sup>15</sup> *Ibid.*, para. 19.

<sup>16</sup> A/C.6/60/SR.18, para. 2.

<sup>17</sup> A/C.6/61/SR.19, para. 32.

<sup>18</sup> A/C.6/61/SR.18, para. 76.

<sup>19</sup> A/C.6/61/SR.19, para. 44.

<sup>20</sup> A/C.6/60/SR.19, para. 36.

<sup>21</sup> A/C.6/61/SR.18, para. 28.

<sup>22</sup> A/C.6/61/SR.19, para. 50.

<sup>23</sup> A/C.6/60/SR.11, para. 41.

<sup>24</sup> A/C.6/60/SR.20, para. 47.

<sup>25</sup> A/C.6/61/SR.18, para. 33.

<sup>26</sup> A/C.6/60/SR.19, para. 18.

<sup>27</sup> A/C.6/61/SR.19, para. 63.

<sup>28</sup> *Ibid.*, para. 70.

<sup>29</sup> A/C.6/60/SR.19, para. 45.

13. The tally is thus 9 delegations opposed to inclusion and 10 delegations in favour of inclusion. The division of opinion has been reflected in the debates in the Commission.<sup>30</sup>

14. In conclusion, the following points can be made by way of emphasis. In the first place, the policy considerations point in different directions. Secondly, in practice, and at the factual level, there is sometimes no distinction between international and non-international armed conflicts. Thirdly, the drafting of draft article 2 (b) avoids according an automatic effect to non-international armed conflict. And, in this connection, attention must be paid to draft article 3 below.

15. In any case it is common for colleagues to ignore the qualification attached to the definition of "armed conflict". The definition is proposed "for the purpose of the present draft articles". It is not the business of the Commission to seek to design an all-purpose definition of "armed conflict".

### **Draft article 3**

#### **Non-automatic termination or suspension**

**The outbreak of an armed conflict does not necessarily terminate or suspend the operation of treaties as:**

- (a) **Between the parties to the armed conflict;**
- (b) **Between one or more parties to the armed conflict and a third State.**

### **Comment**

16. The reader is referred to the commentaries provided in the first report (A/CN.4/552, paras. 25-28), and second report (A/CN.4/570 and Corr.1, paras. 14-17). There are two alterations to the text. The title has been changed and the phrase *ipso facto* eliminated. In the text the term *ipso facto* has been deleted and replaced by "necessarily".

17. As explained in the first report, draft article 3 is the most significant product of the resolution adopted by the Institute of International Law in 1985. The majority of the delegations in the Sixth Committee did not find draft article 3 to be problematical. Austria expressed the view that the underlying concept of draft article 3 "is the point of departure of the whole set of draft articles".<sup>31</sup> As a number of delegations have recognized, draft article 3 reflects an underlying policy and is simply a point of departure. The provisions of draft article 3 are without prejudice to the operation of draft articles 4 to 7 which follow. This series of draft articles is to be read in sequence and conjointly.

18. Certain delegations opposed the replacement of "*ipso facto*" with "necessarily", on the ground that "necessarily" is less incisive.<sup>32</sup> In the opinion of

<sup>30</sup> See *Official Records of the General Assembly, Sixtieth Session, Supplement No. 10* (A/60/10), paras. 139-140; and *ibid.*, *Sixty-first Session, Supplement No. 10* (A/61/10), paras. 192-193.

<sup>31</sup> See A/C.6/60/SR.18, para. 27.

<sup>32</sup> See Malaysia (2006), A/C.6/61/SR.19, para. 51; Jordan (2006), A/C.6/61/SR.18, para. 87; Colombia (2006), *ibid.*, para. 65; and Austria (2005), A/C.6/60/SR.18, para. 27. See also the comment of China (2006), A/C.6/61/SR.18, para. 48.

the Special Rapporteur there is no evident difference of meaning between the two terms.

19. The general opinion in the Sixth Committee during the fifty-seventh and fifty-eighth sessions of the Commission was that draft article 3 played a useful role and should be retained.

#### **Draft article 4**

**The indicia of susceptibility to termination or suspension of treaties in case of an armed conflict**

1. The susceptibility to termination or suspension of treaties in case of an armed conflict is determined in accordance with the intention of the parties at the time the treaty was concluded.

2. The intention of the parties to a treaty relating to its susceptibility to termination or suspension shall be determined in accordance:

(a) With the provisions of articles 31 and 32 of the Vienna Convention on the Law of Treaties; and

(b) The nature and extent of the armed conflict in question.

#### **Comment**

20. The reader is referred to the commentaries provided in the first report (A/CN.4/552, paras. 29-54), and second report (A/CN.4/570 and Corr.1, paras. 18-28).

21. The reference to intention attracted considerable attention in the Sixth Committee and opinion was divided as follows:

(a) States in favour of the criterion of intention: Algeria (2006),<sup>33</sup> China (2005)<sup>34</sup> and (2006),<sup>35</sup> Greece (2005),<sup>36</sup> India (2006),<sup>37</sup> Islamic Republic of Iran (2006),<sup>38</sup> Jordan (2005)<sup>39</sup> and (2006),<sup>40</sup> Malaysia (2006),<sup>41</sup> Romania (2005)<sup>42</sup> and United Kingdom (2005)<sup>43</sup> and (2006).<sup>44</sup>

<sup>33</sup> See A/C.6/61/SR.19, para. 39.

<sup>34</sup> See A/C.6/60/SR.18, para. 9.

<sup>35</sup> See A/C.6/61/SR.18, para. 47.

<sup>36</sup> See A/C.6/60/SR.19, para. 37.

<sup>37</sup> See A/C.6/61/SR.19, para. 28.

<sup>38</sup> Ibid., para. 32.

<sup>39</sup> See A/C.6/60/SR.19, para. 30.

<sup>40</sup> See A/C.6/61/SR.18, para. 88.

<sup>41</sup> See A/C.6/61/SR.19, para. 52.

<sup>42</sup> See A/C.6/60/SR.19, para. 41.

<sup>43</sup> See A/C.6/60/SR.20, para. 1.

<sup>44</sup> See A/C.6/61/SR.19, para. 44.

(b) States regarding the criterion of intention as problematical: Austria (2005),<sup>45</sup> Bulgaria (2006),<sup>46</sup> Colombia (2006),<sup>47</sup> France (2005),<sup>48</sup> Japan (2005),<sup>49</sup> Republic of Korea (2005),<sup>50</sup> Portugal (2006)<sup>51</sup> and the United States (2005).<sup>52</sup>

22. There was a similar division of opinion during the debates in the Commission.<sup>53</sup> The quality of the debate was not enhanced by assertions of omissions from draft article 4, which were mistaken, or by an unwillingness of some colleagues to read the text of draft article 4 as a whole, and in relation to the following articles. Draft article 4 refers to articles 31 and 32 of the Vienna Convention by reference, and yet some States, and some colleagues, have suggested that there should be reference to the text, or the object and purpose, of the treaty. The provisions of article 31 read as follows:

“General rule of interpretation

- “1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
- “2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
  - “(a) Any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
  - “(b) Any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
- “3. There shall be taken into account, together with the context:
  - “(a) Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
  - “(b) Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
  - “(c) Any relevant rules of international law applicable in the relations between the parties.
- “4. A special meaning shall be given to a term if it is established that the parties so intended.”

23. And thus there is in these provisions reference both to the text and to the object and purpose. A connected point is that it is not appropriate for the Special

<sup>45</sup> See A/C.6/60/SR.18, para. 27.

<sup>46</sup> See A/C.6/61/SR.18, para. 23.

<sup>47</sup> Ibid., para. 65.

<sup>48</sup> See A/C.6/60/SR.11, para. 75.

<sup>49</sup> See A/C.6/60/SR.20, para. 22.

<sup>50</sup> See A/C.6/60/SR.18, para. 34.

<sup>51</sup> See A/C.6/61/SR.18, para. 77.

<sup>52</sup> See A/C.6/60/SR.20, para. 32.

<sup>53</sup> See *Official Records of the General Assembly, Sixtieth Session, Supplement No. 10 (A/60/10)*, paras. 151-153, and *ibid.*, *Sixty-first Session, Supplement No. 10 (A/61/10)*, para. 203.

Rapporteur to reinvent the wheel, and, in any case, the Commission has no mandate to revise and amend the Vienna Convention.

24. The opposition to the reliance upon intention is normally based upon the problems of ascertaining the intention of the parties, but this is true of so many legal rules, including legislation and constitutional provisions. The Statute of the Commission provides no warrant for post-modernist heresies. In a general perspective, the difference between the two points of view expressed in the Sixth Committee is probably not, in practical terms, substantial. As article 31 of the Vienna Convention makes clear, the meaning of a treaty may be proved by a variety of means. In any event, the existence and interpretation of a treaty is not a matter of intention as an abstraction, but an intention of the parties "as expressed in the words used by them and in the light of the surrounding circumstances".<sup>54</sup> The ultimate consideration is, what is the aim of interpretation? Surely, it is to discover the intention of the parties and not something else.<sup>55</sup>

25. It has been suggested that the legal consequences of suspension or termination should be defined.<sup>56</sup> But to do that would be to elaborate the provisions of the Vienna Convention, which is not an appropriate task.

#### **Draft article 5**

##### **Express provisions on the operation of treaties**

**Treaties applicable to situations of armed conflict in accordance with their express provisions are operative in case of an armed conflict, without prejudice to the conclusion of lawful agreements between the parties to the armed conflict involving suspension or waiver of the relevant treaties.**

#### **Comment**

26. The reader is referred to the commentaries provided in the first report (A/CN.4/552, paras. 55-58), and second report (A/CN.4/570 and Corr.1, paras. 29-31). While the provisions of draft article 5 received general support, both in the Commission and in the Sixth Committee, several suggestions were made to the effect that it was necessary to present the two paragraphs as separate articles. The Special Rapporteur has recognized the force of these suggestions and proposes the inclusion of former paragraph 2, of draft article 5, in new draft article 5 bis.

27. On a strict view of drafting this draft article was redundant, but it was generally accepted that such a provision should be included for the sake of clarity.

#### **Draft article 5 bis**

##### **The conclusion of treaties during armed conflict**

**The outbreak of an armed conflict does not affect the capacity of the parties to the armed conflict to conclude treaties in accordance with the Vienna Convention on the Law of Treaties.**

<sup>54</sup> See McNair, *The Law of Treaties*, 1961, p. 365.

<sup>55</sup> See Reuter, *Introduction to the Law of Treaties*, 2nd ed., 1985, paras. 141-142.

<sup>56</sup> See the statement by Austria (2005), A/C.6/60/SR.18, para. 27.

## Comment

28. This provision, previously included as paragraph 2 of draft article 5, is now presented as a separate draft article. The term "competence" has been deleted and replaced by "capacity". This draft article is intended to reflect the experience of belligerents in an armed conflict concluding agreements between themselves during the conflict (see A/CN.4/552, paras. 56-57).

### Draft article 6

29. Draft article 6 has been withdrawn by the Special Rapporteur.

### Draft article 6 bis

#### The law applicable in armed conflict

The application of standard-setting treaties, including treaties concerning human rights and environmental protection, continues in time of armed conflict, but their application is determined by reference to the applicable *lex specialis*, namely, the law applicable in armed conflict.

## Comment

30. This new draft provision originates in certain responses to draft article 5, in its earlier form. A number of delegations in the Sixth Committee proposed the inclusion of a provision based upon the principle stated by the International Court of Justice in the *Nuclear Weapons* advisory opinion<sup>57</sup> relating to the relation between human rights and the applicable *lex specialis*, the law applicable in armed conflict which is designed to regulate the conduct of hostilities.<sup>58</sup> Similar views were expressed in the Commission.<sup>59</sup>

31. While the principle now embodied in draft article 6 bis may be said to be, strictly speaking, redundant, the role of the provision in this expository draft is to provide a useful clarification.

### Draft article 7

#### The operation of treaties on the basis of necessary implication from their object and purpose

1. In the case of treaties the object and purpose of which involve the necessary implication that they continue in operation during an armed conflict, the incidence of an armed conflict will not as such inhibit their operation.

2. Treaties of this character include the following:

- (a) Treaties expressly applicable in case of an armed conflict;
- (b) Treaties declaring, creating, or regulating permanent rights or a permanent regime or status;

<sup>57</sup> *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports, 1996*, p. 226 at 240, para. 25.

<sup>58</sup> See the views of the United States (2005), A/C.6/60/SR.20, para. 33.

<sup>59</sup> See *Official Records of the General Assembly, Sixtieth Session, Supplement No. 10 (A/60/10)*, para. 159; and *ibid.*, *Sixty-first Session, Supplement No. 10 (A/61/10)*, para. 206.

- (c) Treaties of friendship, commerce and navigation and analogous agreements concerning private rights;
- (d) Treaties for the protection of human rights;
- (e) Treaties relating to the protection of the environment;
- (f) Treaties relating to international watercourses and related installations and facilities;
- (g) Multilateral law-making treaties;
- (h) Treaties relating to the settlement of disputes between States by peaceful means, including resort to conciliation, mediation, arbitration and the International Court of Justice;
- (i) Obligations arising under multilateral conventions relating to commercial arbitration and the enforcement of awards;
- (j) Treaties relating to diplomatic relations;
- (k) Treaties relating to consular relations.

### Comment

32. The reader is referred to the commentaries provided in the first report (A/CN.4/552, paras. 62-118); and in the second report (A/CN.4/570 and Corr.1, paras. 34-42).<sup>60</sup>

33. Draft article 7 attracted comments both fairly numerous and very varied in content. The points of view expressed can be classified as follows:

#### (a) Is draft article 7 necessary?

34. A number of delegations in the Sixth Committee adopted the position that the whole provision was redundant, in view of the role already played by draft articles 3 and 4. The Special Rapporteur had some sympathy with this position and consequently made the following suggestion:

At the end of the day, it may be that the solution lies within the realm of presentation. On this basis draft article 7 would be deleted; as has been emphasised already, its purpose was indicative and expository. The question then is to find an appropriate container for the materials on which draft article 7 has been built. The obvious answer would be an annex containing an analysis of the State practice and case law which could be prepared by the Secretariat with assistance from the Special Rapporteur.<sup>61</sup>

<sup>60</sup> See *Official Records of the General Assembly, Sixtieth Session, Supplement No. 10* (A/60/10), paras. 167-175; and *ibid.*, *Sixty-first Session, Supplement No. 10* (A/61/10), paras. 209-211.

<sup>61</sup> See A/CN.4/570 and Corr.1, para. 37.

**(b) The inclusion in paragraph 2 of reference to treaties codifying *jus cogens* rules**

35. The Special Rapporteur does not regard the inclusion of treaties or treaty provisions codifying *jus cogens* rules<sup>62</sup> as acceptable. Such possibility raises a major question of general international law, and one which is notoriously difficult. Moreover, this category is not qualitatively similar to the other categories which have been proposed.

**(c) The role of an indicative list of categories of treaties**

36. In the Sixth Committee at least five delegations accepted the role of an indicative list of categories of treaties, though with reservations relating to the substance of the categories proposed.<sup>63</sup>

**(d) Opposition to the use of an indicative list**

37. A number of delegations were opposed to, or sceptical about, the viability of, the use of an indicative list of categories of treaties.<sup>64</sup>

**(e) The enumeration of factors relevant to the determination that a given treaty should continue in operation in the event of armed conflict**

38. In the Sixth Committee six delegations expressed support for the identification of factors relevant to the determination that a given treaty should continue in operation in the event of armed conflict.<sup>65</sup> It is worth noting that this field of opinion was in favour of the retention of draft article 7 in some form.

**(f) The formulation of draft article 7**

39. In the debate in the Commission in the 2005 session, the policy of the provisions of draft article 7 was explained by the Special Rapporteur as follows:

The Special Rapporteur observed that the draft article 7 dealt with the species of treaties the object and purpose of which involved the necessary implication that they would continue in operation during an armed conflict. Paragraph 1 established the basic principle that the incidence of armed conflict would not, as such, inhibit the operation of those treaties. Paragraph 2 contained an indicative list of some such categories of treaties. It was observed that the effect of such categorization was to create a set of weak rebuttable presumptions as to the object and purpose of those types of treaties, i.e. as evidence of the object and purpose of the treaty to the effect that it survives a war. He clarified that while he did not agree with all the categories of treaties

<sup>62</sup> See memorandum prepared by the Secretariat (A/CN.4/550 and Corr.1 and 2, para. 31).

<sup>63</sup> See Bulgaria (2006), A/C.6/61/SR.18, para. 23; Jordan (2006), *ibid.*, para. 89; Republic of Korea (2005), A/C.6/60/SR.18, para. 36; Portugal (2006), A/C.6/61/SR.18, para. 78; and Romania (2005), A/C.6/60/SR.19, para. 43.

<sup>64</sup> See the position of India (2005), A/C.6/60/SR.18, para. 64; Poland (2005), A/C.6/60/SR.19, para. 19; the United Kingdom (2005), A/C.6/60/SR.20, para. 1; and the United States (2005), *ibid.*, para. 34 and (2006), A/C.6/61/SR.19, para. 41.

<sup>65</sup> See the views of China (2006), A/C.6/61/SR.18, para. 49; Colombia (2006), *ibid.*, para. 67; India (2006), A/C.6/61/SR.19, para. 29; Malaysia (2006), *ibid.*, para. 54; the United Kingdom (2006), *ibid.*, para. 44; and the United States (2005), A/C.6/60/SR.20, para. 32, and (2006), A/C.6/61/SR.19, para. 41.

in the list, he had nonetheless included them as potential candidates for consideration by the Commission. The list reflected the views of several generations of writers and was to a considerable extent reflected in available State practice, particularly United States practice dating back to the 1940s. While closely linked to draft articles 3 and 4, the draft article was primarily expository and could accordingly be excluded.<sup>66</sup>

40. The fact is that the provisions of draft article 7 are very flexible. Moreover, it is not exclusive to the categories introduced but applies generally. Thus the second paragraph provides that: "Treaties of this character include the following ..."

41. The use of categories was the object of carefully articulated comment by the United States in the Sixth Committee, at the sixtieth session of the General Assembly, in 2005, and it must be quoted once more:

Article 7 deals with the operation of treaties on the basis of implications drawn from their object and purpose. It is the most complex of the draft articles. It lists twelve categories of treaties that, owing to their object and purpose, imply that they should be continued in operation during an armed conflict. This is problematic because attempts at such broad categorisation of treaties always seem to fail. Treaties do not automatically fall into one of several categories. Moreover, even with respect to classifying particular provisions, the language of the provisions and the intention of the parties may differ from similar provisions in treaties between other parties. It would be more productive if the Commission could enumerate factors that might lead to the conclusion that a treaty or some of its provisions should continue (or be suspended or terminated) in the event of armed conflict. The identification of such factors would, in many cases, provide useful information and guidance to States on how to proceed.<sup>67</sup>

42. As was pointed out in the second report, the categories employed in draft article 7 may stand in need of improvements, but the fact is that most of the categories are derived directly from the policy prescriptions and legal assessments of leading authorities, together with a significant amount of jurisprudence and practice. If the first report is properly examined, it can be seen that the categories employed are not abstract but have strong roots in the matrix of legal sources.

43. Against this background it can be argued that the categories reflect the very factors to which the United States refers in the statement quoted above.

#### **(g) Retaining the categories in draft article 7**

44. In the second report the Special Rapporteur made a tentative proposal to delete draft article 7, but to produce an annex containing an analysis of the State practice and case law, which could be prepared by the Secretariat. After further thought, the Special Rapporteur has discarded this proposal and has decided to maintain the original approach adopted in draft article 7.

<sup>66</sup> See *Official Records of the General Assembly, Sixtieth Session, Supplement No. 10 (A/60/10)*, para. 167.

<sup>67</sup> Summarized in A/C.6/60/SR.20, para. 34.

45. The reasons for this decision are as follows (and in no particular order):

(a) The existing form of draft article 7 still provides a good basis for a fruitful discussion, together with the relevant sections of the memorandum prepared by the Secretariat;

(b) The proposals for an alternative approach by way of relevant factors do not have enough merit and would probably increase the ills which have been accredited to the categories;

(c) The categories put forward by the Special Rapporteur are based upon a considerable quantity of legal experience and doctrine;

(d) The relation between the sequence of draft articles is legally significant and should be maintained.

**(h) The significance of State practice**

46. A number of delegations have pointed out that some of the categories of treaties offered as candidates for inclusion in draft article 7 do not find much support in the practice of States.<sup>68</sup> Having surveyed the available legal sources, it becomes clear that there are two different situations. The first relates to those cases, such as treaties creating permanent regimes, which have a firm base in State practice. The second situation relates to cases which have a firm basis in the jurisprudence of municipal courts and some executive advice to courts, but are not supported by State practice in a conventional mode.

47. These considerations lead to the important question: should the Commission close the door to those categories of treaty which have substantial recognition in reliable legal sources, in the absence of support by State practice as such? Given the mandate of the Commission to promote "the progressive development of international law *and* its codification" (emphasis added), it would seem to be inappropriate to insist that the categories of treaties admitted to the second paragraph of the draft article should all constitute a part of existing general international law. This is not the applicable standard of admission.

48. With reference to evidence of State practice, two other points should be made. In the first place, the likelihood of a substantial flow of information from States is small. And, secondly, the identification of relevant State practice is, in this sphere, unusually difficult. It often is the case that apparent examples of State practice concern legal principles which bear no relation to the effect of armed conflict on treaties as a precise legal issue. For example, some of the modern State practice which has been cited<sup>69</sup> refers, for the most part, to the effect of a fundamental change of circumstances,<sup>70</sup> or to the supervening impossibility of performance, and is accordingly irrelevant.

<sup>68</sup> See the views of Chile (2006), A/C.6/61/SR.19, para. 7; Jordan (2006), A/C.6/61/SR.18, para. 89; Republic of Korea (2005), A/C.6/60/SR.18, para. 36; and Malaysia (2006), A/C.6/61/SR.19, para. 54.

<sup>69</sup> See A/CN.4/550 and Corr.1 and 2, paras. 82-91.

<sup>70</sup> See the analysis of the conflict in the Former Yugoslavia, *ibid.*, paras. 111-113.

**(i) The role of *lex specialis***

49. In the Sixth Committee a number of delegations indicated that draft article 7 needed clarification in respect of the role of *lex specialis*. Accordingly, it should be made clear that the implication of continuity does not affect the application of the law of armed conflict as the *lex specialis* applicable in times of armed conflict.<sup>71</sup>

50. The Special Rapporteur agrees that such clarification is desirable and therefore proposes the inclusion of draft article 6 bis.

**(j) The categories of treaties to be included in draft article 7**

51. It has already been indicated that the Special Rapporteur has decided to maintain draft article 7 in its present form. Notwithstanding the criticisms expressed in some quarters, the existing format still provides a useful starting point for further debate. It must also be recalled that a proportion of the categories deployed are supported by the legal sources, including some State practice. It may be that, if the use of categories of treaties is maintained, the existing selection of eleven categories should be varied.

52. In examining the available materials careful account has been taken of the 16 categories proposed in the memorandum prepared by the Secretariat (A/CN.4/550 and Corr.1 and 2, paras. 17-78). The selection proposed therein overlaps substantially with the selection produced in draft article 7 in the first and second reports. No doubt some of the categories in the memorandum not represented in the work of the Special Rapporteur may receive sponsorship in the future, either in the Sixth Committee or in the Commission. In the meanwhile, the selection proposed by the Special Rapporteur has been maintained.

53. It is to be noted that there have been very few proposals for the deletion of the categories deployed by the Special Rapporteur. However, the delegation of the United Kingdom expressed scepticism concerning the inclusion of treaties relating to the protection of the environment.<sup>72</sup>

54. By way of emphasis, it should be stated that the categories are indicative and are expressed *not* to be an exclusive list. Thus draft article 7, paragraph 1, provides clearly that "the incidence of an armed conflict will not *as such* inhibit their operation." (emphasis added). In the second place, the provision does not seek to prejudice the question of the applicable law, whether this constitutes *lex specialis* or otherwise. The logical progression must be that if the operation of a treaty is inhibited, then *necessarily* it will not form part of the applicable law.

55. In conclusion, draft article 7 is indicative and it is paragraph 1 which governs. Consequently, the "object and purpose" criterion is generally applicable. Draft article 7 is ancillary to draft articles 3 and 4.

<sup>71</sup> See the views of the delegations of Republic of Korea (2005), A/C.6/60/SR.18, para. 36, and the United Kingdom (2005), A/C.6/60/SR.20, para. 1. The United States made a similar observation in the context of draft article 5 (2005), A/C.6/60/SR.20, para. 33.

<sup>72</sup> See A/C.6/60/SR.20, para. 1.

**(k) The options available**

56. It is useful to end this long recital with a list of options which are available in light of the various discussions of draft article 7. Four options appear to be available:

- (a) The deletion of the draft article on the basis that it is not needed because draft articles 3 and 4 already do the work;
- (b) The maintenance of the draft article in its present form but with some variations in the identification of appropriate categories of treaties;
- (c) The substitution of a new paragraph 2 relying not upon categories of treaties but upon relevant factors or criteria;
- (d) The deletion of draft article 7 accompanied by the preparation of an annex containing an analysis of the State practice and case law.

**Draft article 8****Mode of suspension or termination**

**In case of an armed conflict the mode of suspension or termination shall be the same as in those forms of suspension or termination included in the provisions of articles 42 to 45 of the Vienna Convention on the Law of Treaties.**

**Comment**

57. In the first report it was stated that the point in play here stems from the consideration that suspension or termination does not take place ipso facto and by operation of law.

**Draft article 9****The resumption of suspended treaties**

**1. The operation of a treaty suspended as a consequence of an armed conflict shall be resumed provided that this is determined in accordance with the intention of the parties at the time the treaty was concluded.**

**2. The intention of the parties to a treaty, the operation of which has been suspended as a consequence of an armed conflict, concerning the susceptibility of the treaty to resumption of operation shall be determined in accordance:**

- (a) With the provisions of articles 31 and 32 of the Vienna Convention on the Law of Treaties; and**
- (b) With the nature and extent of the armed conflict in question.**

**Comment**

58. Draft article 9 constitutes the further development of draft article 4, which lays down the general criterion of intention.

**Draft article 10****Effect of the exercise of the right to individual or collective self-defence on a treaty**

**A State exercising its rights of individual or collective self-defence in accordance with the Charter of the United Nations is entitled to suspend in whole or in part the operation of a treaty incompatible with the exercise of that right, subject to any consequences resulting from a later determination by the Security Council of that State as an aggressor.**

**Comment**

59. This draft replaces the text of former draft article 10 and is taken from article 7 of the resolution of the Institute of International Law adopted in 1985. It will be recalled that the pertinent provisions of that resolution were set forth (as an alternative approach) in the first report (see A/CN.4/552, para. 123). The purpose of the new draft is to reflect the concerns expressed, both in the Commission and in the Sixth Committee, to the effect that the previous version of the draft article left open the possibility that there would be no difference in the legal effect concerning treaty relations between an aggressor State and a State acting in self-defence. In the Sixth Committee such opinions were expressed by Algeria (2005),<sup>73</sup> China (2005),<sup>74</sup> France (2005),<sup>75</sup> Greece (2005),<sup>76</sup> Islamic Republic of Iran (2005),<sup>77</sup> Japan (2005),<sup>78</sup> Malaysia (2006)<sup>79</sup> and Morocco (2005).<sup>80</sup>

60. The earlier version of the draft article read as follows:

**The incidence of the termination or suspension of a treaty shall not be affected by the legality of the conduct of the parties to the armed conflict according either to the principles of general international law or the provisions of the Charter of the United Nations.**

61. The replacement of the earlier text is called for on a pragmatic basis, as being a necessary clarification. However, the need for clarification arises in fact from a misunderstanding of the former version. The former draft was intended as a corollary to draft article 3. The outbreak of an armed conflict does not lead automatically to termination or suspension. In any event, this principle of continuity is obviously without prejudice to the law applicable to the relations of the States concerned, including the law relating to the use or threat of force by States, and the powers of the Security Council under Chapter VII of the Charter of the United Nations. There is an important factor of legal security involved (see A/CN.4/552, para. 122). This element was expressed in the Sixth Committee by the United Kingdom:

<sup>73</sup> A/C.6/60/SR.20, para. 64.

<sup>74</sup> A/C.6/60/SR.18, para. 10.

<sup>75</sup> A/C.6/60/SR.11, para. 75.

<sup>76</sup> A/C.6/60/SR.19, para. 37.

<sup>77</sup> A/C.6/60/SR.18, paras. 6-7.

<sup>78</sup> A/C.6/60/SR.20, para. 22.

<sup>79</sup> A/C.6/61/SR.19, para. 55.

<sup>80</sup> A/C.6/60/SR.11, para. 42.

We think that this draft article is broadly along the right lines. In accordance with our view that this topic is essentially one that concerns the operation of the law of treaties, we do not think that this is the right place in which to review the law on the use of force. We, of course, agree with the general proposition that an aggressor State should not benefit from its aggression. Nevertheless we also share the Special Rapporteur's view that to allow a simple, unilateral assertion of an illegal use of force as a basis for the termination or suspension of treaties is likely to be inimical to the stability of treaty relations.<sup>81</sup>

62. The root of the difference of opinion is technical and legal. The principle of continuity (as in draft articles 3 and 4) is applied on an ordinal, or sequential, basis, and it applies across the board. Consequently, the principle is entirely without prejudice to the operation of the applicable law, and it is not a principle of validation.

#### **Draft article 11** **Decisions of the Security Council**

**These articles are without prejudice to the legal effects of decisions of the Security Council in accordance with the provisions of Chapter VII of the Charter of the United Nations.**

#### **Comment**

63. The proviso is not strictly necessary but is nonetheless useful in an expository draft. It may be recalled that article 75 of the Vienna Convention on the Law of Treaties provides as follows:

##### *"Case of an Aggressor State"*

"The provisions of the present Convention are without prejudice to any obligation in relation to a treaty which may arise for an aggressor State in consequence of measures taken in conformity with the Charter of the United Nations with reference to that State's aggression."

64. This draft article received general support both in the Commission and in the Sixth Committee.

#### **Draft article 12** **Status of third States as neutrals**

**The present draft articles are without prejudice to the status of third States as neutrals in relation to an armed conflict.**

#### **Comment**

65. This proviso is not strictly necessary but has a pragmatic purpose. This draft article received general support both in the Commission and in the Sixth Committee.

<sup>81</sup> Summarized in A/C.6/60/SR.20, para. 1.

**Draft article 13**

**Cases of termination or suspension**

The present draft articles are without prejudice to the termination or suspension of treaties as a consequence of:

- (a) The agreement of the parties; or
- (b) A material breach; or
- (c) Supervening impossibility of performance; or
- (d) A fundamental change of circumstances.

**Comment**

66. Once again it can be said that such a reservation states the obvious. However, it is believed that the clarification has some significance.

**Draft article 14**

**The revival of terminated or suspended treaties**

The present draft articles are without prejudice to the competence of parties to an armed conflict to regulate the question of the maintenance in force or revival of treaties, suspended or terminated as a result of the armed conflict, on the basis of agreement.

**Comment**

67. This reservation has the specific purpose of dealing with the situation in which the status of "pre-war" agreements is ambiguous and it is necessary to make an overall assessment of the treaty picture. Such an assessment may, in practice, involve the revival of treaties the status of which was ambiguous or which had been treated as though terminated by one or both of the parties. The draft article received general acceptance both in the Commission and in the Sixth Committee.

## Annex

### Text of draft articles (as proposed in the third report)

#### Draft article 1

##### Scope

The present draft articles apply to the effects of an armed conflict in respect of treaties between States.

#### Draft article 2

##### Use of terms

For the purposes of the present draft articles:

(a) "Treaty" means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments, and whatever its particular designation;

(b) "Armed conflict" means a state of war or a conflict which involve armed operations which by their nature or extent are likely to affect the operation of treaties between States parties to the armed conflict or between State parties to the armed conflict and third States, regardless of a formal declaration of war or other declaration by any or all of the parties to the armed conflict.

#### Draft article 3

##### Non-automatic termination or suspension

The outbreak of an armed conflict does not necessarily terminate or suspend the operation of treaties as:

- (a) Between the parties to the armed conflict;
- (b) Between one or more parties to the armed conflict and a third State.

#### Draft article 4

##### The indicia of susceptibility to termination or suspension of treaties in case of an armed conflict

1. The susceptibility to termination or suspension of treaties in case of an armed conflict is determined in accordance with the intention of the parties at the time the treaty was concluded.
2. The intention of the parties to a treaty relating to its susceptibility to termination or suspension shall be determined in accordance:
  - (a) With the provisions of articles 31 and 32 of the Vienna Convention on the Law of Treaties; and
  - (b) The nature and extent of the armed conflict in question.

#### Draft article 5

##### Express provisions on the operation of treaties

Treaties applicable to situations of armed conflict in accordance with their express provisions are operative in case of an armed conflict, without prejudice to

the conclusion of lawful agreements between the parties to the armed conflict involving suspension or waiver of the relevant treaties.

#### **Draft article 5 bis**

##### **The conclusion of treaties during armed conflict**

The outbreak of an armed conflict does not affect the capacity of the parties to the armed conflict to conclude treaties in accordance with the Vienna Convention on the Law of Treaties.

#### **Draft article 6<sup>a</sup>**

...

#### **Draft article 6 bis**

##### **The law applicable in armed conflict**

The application of standard-setting treaties, including treaties concerning human rights and environmental protection, continues in time of armed conflict, but their application is determined by reference to the applicable *lex specialis*, namely, the law applicable in armed conflict.

#### **Draft article 7**

##### **The operation of treaties on the basis of necessary implication from their object and purpose**

1. In the case of treaties the object and purpose of which involve the necessary implication that they continue in operation during an armed conflict, the incidence of an armed conflict will not as such inhibit their operation.
2. Treaties of this character include the following:
  - (a) Treaties expressly applicable in case of an armed conflict;
  - (b) Treaties declaring, creating, or regulating permanent rights or a permanent regime or status;
  - (c) Treaties of friendship, commerce and navigation and analogous agreements concerning private rights;
  - (d) Treaties for the protection of human rights;
  - (e) Treaties relating to the protection of the environment;
  - (f) Treaties relating to international watercourses and related installations and facilities;
  - (g) Multilateral law-making treaties;
  - (h) Treaties relating to the settlement of disputes between States by peaceful means, including resort to conciliation, mediation, arbitration and the International Court of Justice;
  - (i) Obligations arising under multilateral conventions relating to commercial arbitration and the enforcement of awards;

<sup>a</sup> Draft article 6 was withdrawn by the Special Rapporteur.

- (j) Treaties relating to diplomatic relations;
- (k) Treaties relating to consular relations.

#### **Draft article 8**

##### **Mode of suspension or termination**

In case of an armed conflict the mode of suspension or termination shall be the same as in those forms of suspension or termination included in the provisions of articles 42 to 45 of the Vienna Convention on the Law of Treaties.

#### **Draft article 9**

##### **The resumption of suspended treaties**

1. The operation of a treaty suspended as a consequence of an armed conflict shall be resumed provided that this is determined in accordance with the intention of the parties at the time the treaty was concluded.
2. The intention of the parties to a treaty, the operation of which has been suspended as a consequence of an armed conflict, concerning the susceptibility of the treaty to resumption of operation shall be determined in accordance:
  - (a) With the provisions of articles 31 and 32 of the Vienna Convention on the Law of Treaties;
  - (b) With the nature and extent of the armed conflict in question.

#### **Draft article 10**

##### **Effect of the exercise of the right to individual or collective self-defence on a treaty**

A State exercising its rights of individual or collective self-defence in accordance with the Charter of the United Nations is entitled to suspend in whole or in part the operation of a treaty incompatible with the exercise of that right, subject to any consequences resulting from a later determination by the Security Council of that State as an aggressor.

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These articles are without prejudice to the legal effects of decisions of the Security Council in accordance with the provisions of Chapter VII of the Charter of the United Nations.

#### **Draft article 12**

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The present draft articles are without prejudice to the status of third States as neutrals in relation to an armed conflict.

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The present draft articles are without prejudice to the termination or suspension of treaties as a consequence of:

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- (d) A fundamental change of circumstances.

**Draft article 14**

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The present draft articles are without prejudice to the competence of parties to an armed conflict to regulate the question of the maintenance in force or revival of treaties, suspended or terminated as a result of the armed conflict, on the basis of agreement.



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## International Law Commission

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## **The obligation to extradite or prosecute (*aut dedere aut judicare*)**

### **Comments and information received from Governments**

#### **I. Introduction**

1. The present report has been prepared pursuant to General Assembly resolution 61/34 of 4 December 2006, in which the Assembly, *inter alia*, invited Governments to provide to the International Law Commission information on legislation and practice regarding the topic "The obligation to extradite or prosecute (*aut dedere aut judicare*)".

2. At its fifty-eighth session in 2006, the Commission decided in accordance with article 19(2) of its Statute to request, through the Secretary-General, Governments to submit information concerning their legislation and practice, particularly more contemporary, with regard to the topic "The obligation to extradite or prosecute (*aut dedere aut judicare*)". More specifically, Governments were requested to provide information concerning:

"(a) International treaties by which a State is bound, containing the obligation to extradite or prosecute, and reservation made by that State to limit the application of this obligation;

"(b) Domestic legal regulation adopted and applied by a State, including constitutional provisions and penal codes of criminal procedures, concerning the obligation to extradite or prosecute (*aut dedere aut judicare*);

"(c) Judicial practice of a State reflecting the application of the obligation *aut dedere aut judicare*;

"(d) Crimes or offences to which the principle of the obligation *aut dedere aut judicare* is applied in the legislation or practice of a State."<sup>1</sup>

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<sup>1</sup> See *Official Records of the General Assembly, Sixty-first Session, Supplement No. 10 (A/61/10)*, para. 30.



3. As at 1 March 2007 written observations were received from the following seven States: Austria, Croatia, Japan, Monaco, Qatar, Thailand and the United Kingdom of Great Britain and Northern Ireland. Additional information received will be reproduced as addenda to the present report.

4. The responses from Governments have been organized around the four clusters of information referred to in paragraph 2 above.

## **II. Comments and information received from Governments**

### **A. International treaties by which a State is bound, containing the obligation to extradite or prosecute (*aut dedere aut judicare*), and reservations made by that State to limit the application of this obligation**

#### **Austria**

5. The following bilateral treaties concluded by Austria contain the obligation *aut dedere aut judicare*:

(a) The Treaty between the Government of the Republic of Austria and the Government of Canada on Extradition, signed on 5 October 1998 in Ottawa, Federal Law Gazette III No. 159/2000. The relevant article 3 paragraph 2 lit. a and b read as follows:

"Article 3(2): Extradition may be refused in any of the following circumstances:

if the person whose extradition is requested is a national of the Requested State. Where the Requested State refuses to extradite a national of that State it shall, if the other State so requests, submit the case to the competent authorities in order that proceedings for the prosecution of the person in respect of all or any of the offences for which extradition has been requested may be taken;

if the offence for which extradition is requested is subject to the jurisdiction of the Requested State and that State will prosecute that offence; [...]"

(b) The Extradition Treaty between the Government of the Republic of Austria and the Government of the United States of America, signed on 8 January 1998 in Washington, D.C., Federal Law Gazette III No. 216/1999. The relevant article 3 paragraph 2 reads as follows:

"Article 3 (2): If extradition is refused solely on the basis of the nationality of the person sought, the Requested State shall, at the request of the Requesting State, submit the case to its authorities for prosecution."

6. Austria has made no reservations to relevant multilateral treaties which limit the application of the obligation *aut dedere aut judicare*.

#### **Croatia**

7. International treaties containing an obligation to extradite or prosecute for the Republic of Croatia are: the International Convention for the Suppression of

Counterfeiting Currency, Geneva, 1929;<sup>2</sup> the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, New York, 1950;<sup>3</sup> the European Convention on Extradition, Paris, 1957;<sup>4</sup> the Single Convention on Narcotic Drugs, New York, 1961;<sup>5</sup> the Convention for the Suppression of Unlawful Seizure of Aircraft, The Hague, 1970;<sup>6</sup> the Convention on Psychotropic Substances, Vienna, 1971;<sup>7</sup> the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, Montreal, 1971;<sup>8</sup> the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, New York, 1973;<sup>9</sup> the European Convention on the Suppression of Terrorism, Strasbourg, 1977;<sup>10</sup> the International Convention against the Taking of Hostages, New York, 1979;<sup>11</sup> the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, New York, 1984;<sup>12</sup> the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Vienna, 1988;<sup>13</sup> the Convention on the Safety of United Nations and Associated Personnel, New York, 1994;<sup>14</sup> the International Convention against the Recruitment, Use, Financing and Training of Mercenaries, New York, 1989;<sup>15</sup> the International Convention for the Suppression of Terrorist Bombings, New York, 1997;<sup>16</sup> the International Convention for the Suppression of the Financing of Terrorism, New York, 1999;<sup>17</sup> the Criminal Law Convention on Corruption, Strasbourg, 1999;<sup>18</sup> the United Nations Convention against Transnational Organized Crime, New York, 2000;<sup>19</sup> the Convention on Cybercrime, Strasbourg, 2001;<sup>20</sup> and the United Nations Convention against Corruption, New York, 2003.<sup>21</sup>

## Japan

8. Japan has concluded the following multilateral treaties containing the obligation to extradite or prosecute, and it has made no reservations to limit the application of the obligation in any of these treaties: the Convention for the Suppression of Illicit Traffic in Dangerous Drugs, Geneva, 1936;<sup>22</sup> the Geneva Conventions of 1949 (the Convention for the Amelioration of the Condition of the

<sup>2</sup> League of Nations Treaty Series, vol. 112, No. 2623.

<sup>3</sup> United Nations, *Treaty Series*, vol. 96, No. 1342.

<sup>4</sup> European Treaty Series No. 24.

<sup>5</sup> United Nations, *Treaty Series*, vol. 520, No. 7515.

<sup>6</sup> *Ibid.*, vol. 860, No. 12325.

<sup>7</sup> *Ibid.*, vol. 1019, No. 14956.

<sup>8</sup> *Ibid.*, vol. 974, No. 14118.

<sup>9</sup> *Ibid.*, vol. 1035, No. 15410.

<sup>10</sup> *Ibid.*, vol. 1137, No. 17828.

<sup>11</sup> *Ibid.*, vol. 1316, No. 21931.

<sup>12</sup> *Ibid.*, vol. 1465, No. 24841.

<sup>13</sup> *Ibid.*, vol. 1582, No. 27627.

<sup>14</sup> *Ibid.*, vol. 2051, No. 35457.

<sup>15</sup> *Ibid.*, vol. 2163, No. 37789.

<sup>16</sup> *Ibid.*, vol. 2149, No. 37517.

<sup>17</sup> General Assembly resolution 54/109 of 9 December 1999.

<sup>18</sup> European Treaty Series No. 173.

<sup>19</sup> General Assembly resolution 55/25 of 15 November 2000.

<sup>20</sup> European Treaty Series No. 185.

<sup>21</sup> General Assembly resolution 58/4 of 31 October 2003.

<sup>22</sup> League of Nations, *Treaty Series*, vol. 198, No. 4648.

Wounded and Sick in the Armed Forces in the Field, 1949;<sup>23</sup> the Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of the Armed Forces at Sea, 1949;<sup>24</sup> the Convention relative to the Treatment of Prisoners of War, 1949;<sup>25</sup> and the Convention relative to the Protection of Civilian Persons in Time of War, 1949);<sup>26</sup> the Convention for the Suppression of Traffic in Persons and the Exploitation of the Prostitution of Others, New York, 1950; the Convention on the High Seas, Geneva, 1958;<sup>27</sup> the Single Convention on Narcotic Drugs, New York, 1961; the Convention for the Suppression of Unlawful Seizure of Aircraft, The Hague, 1970; the Convention on Psychotropic Substances, Vienna 1971; the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, Montreal, 1971; the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, New York, 1973; the Protocol I Additional to the Geneva Conventions of 12 August 1949, and relating to Protection of Victims of International Armed Conflict, Geneva, 1977;<sup>28</sup> the International Convention against the Taking of Hostages, New York, 1979; the Convention on the Physical Protection of Nuclear Material, Vienna and New York, 1980;<sup>29</sup> the United Nations Convention on the Law of the Sea, Montego Bay, 1982;<sup>30</sup> the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, Rome, 1988;<sup>31</sup> the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf, Rome, 1988;<sup>31</sup> the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Vienna, 1988; the Convention on the Safety of United Nations and Associated Personnel, New York, 1994; the International Convention for the Suppression of Terrorist Bombings, New York, 1997; and the International Convention for the Suppression of the Financing of Terrorism, New York, 1999.

9. Japan has also concluded bilateral extradition treaties with the United States of America and the Republic of Korea. However, they both stipulate only an obligation to extradite under certain conditions,<sup>32</sup> but not "the obligation to extradite or prosecute".

#### Monaco

10. Monaco is party to the following international treaties containing a disposition on the obligation to extradite or prosecute, which have been given effect in the national legislation through sovereign ordinances: the Convention for the Suppression of Unlawful Seizure of Aircraft, The Hague, 1970;<sup>33</sup> the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, Montreal,

<sup>23</sup> United Nations, *Treaty Series*, vol. 75, No. 970.

<sup>24</sup> *Ibid.*, No. 971.

<sup>25</sup> *Ibid.*, No. 972.

<sup>26</sup> *Ibid.*, No. 973.

<sup>27</sup> *Ibid.*, vol. 450, No. 6465.

<sup>28</sup> *Ibid.*, vol. 1125, No. 17512.

<sup>29</sup> *Ibid.*, vol. 1456, No. 24631.

<sup>30</sup> *Ibid.*, vol. 1833, No. 31363.

<sup>31</sup> *Ibid.*, vol. 1678, No. 29004.

<sup>32</sup> The complete text of the Treaty, provided by the Government of Japan, is available for consultation at the Codification Division of the Office of Legal Affairs of the United Nations.

<sup>33</sup> Sovereign ordinances No. 7.962 of 24 April 1984 and No. 15.655 of 7 February 2003.

1971;<sup>34</sup> the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, New York, 1973;<sup>35</sup> the International Convention against the Taking of Hostages, New York, 1979;<sup>36</sup> the Convention on the Physical Protection of Nuclear Material, 1980;<sup>37</sup> the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, New York, 1984;<sup>38</sup> the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Vienna, 1988;<sup>39</sup> the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, 1988 (Maritime Safety Navigation Convention);<sup>40</sup> the Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Montreal Convention, 1988 (Montreal Protocol);<sup>41</sup> the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf, 1988;<sup>42</sup> the International Convention for the Suppression of Terrorist Bombings, New York, 1997;<sup>43</sup> the International Convention for the Suppression of the Financing of Terrorism, New York, 1999;<sup>44</sup> the United Nations Convention against Transnational Organized Crime, New York, 2000;<sup>45</sup> the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, 2000, supplementary to the United Nations Convention against Transnational Organized Crime;<sup>45</sup> the Protocol against the Smuggling of Migrants by Land, Sea and Air, 2000, supplementary to the United Nations Convention against Transnational Organized Crime.<sup>46</sup>

11. Furthermore, Monaco is Party to 17 bilateral treaties on extradition with the following countries: Australia, Austria, Belgium, Czechoslovakia, Denmark, France, Germany, Italy, Liberia, the Netherlands, Russia, Spain, Switzerland, the United Kingdom and the United States. Most of these treaties were concluded at the end of the nineteenth or the beginning of the twentieth century. Accordingly, they provide an exhaustive list of offences for which a person may be extradited without reference to a minimum sentence that may be incurred, as it is the case in modern conventions.

12. Some of these bilateral treaties provide for the possibility to prosecute a person if extradition is refused on the ground of the nationality of the person requested, as for example, article 5 of the Convention between Monaco and Italy of 26 March 1866, as amended on 23 December 1896; article 5 of the Convention between Monaco and Australia of 19 October 1988; article 6 of the Convention between Monaco and France of 11 May 1992; and article 5 of the Convention between Monaco and Belgium of 29 June 1874.

<sup>34</sup> Sovereign ordinances No. 7.964 of 24 April 1984 and No. 15.655 of 7 February 2003.

<sup>35</sup> Sovereign ordinances No. 15.638 of 24 January 2003 and No. 15.655 of 7 February 2003.

<sup>36</sup> Sovereign ordinances No. 15.157 of 20 December 2001 and No. 15.655 of 7 February 2003.

<sup>37</sup> Sovereign ordinances No. 12.093 of 28 November 1996 and No. 15.655 of 7 February 2003.

<sup>38</sup> Sovereign ordinances No. 10.542 of 14 May 1992.

<sup>39</sup> Sovereign ordinance of 3 July 1991.

<sup>40</sup> Sovereign ordinance No. 15.322 of 8 April 2002.

<sup>41</sup> Sovereign ordinances No. 11.177 of 10 February 1994 and No. 15.655 of 7 February 2003.

<sup>42</sup> Sovereign ordinance No. 15.323 of 8 April 2002.

<sup>43</sup> Sovereign ordinances No. 15.083 and No. 15.088 of 30 October 2001 and their annex.

<sup>44</sup> Sovereign ordinance No. 15.319 of 8 April 2002.

<sup>45</sup> Sovereign ordinance No. 605 of 1 August 2006.

<sup>46</sup> General Assembly resolution 55/25 of 15 November 2000 — Sovereign ordinance No. 605 of 1 August 2006.

### **Qatar**

13. There exist a number of multilateral and bilateral conventions ratified by the State of Qatar which relate to legal and judicial cooperation, the extradition of criminals and the exchange of information relating thereto. Qatar has also signed others and yet others are currently being studied.

14. Qatar has acceded to the following multilateral agreements: the International Convention against the Taking of Hostages, 1979; the Convention on Psychotropic Substances, 1971; the International Convention on the Suppression and Punishment of the Crime of Apartheid, 1973;<sup>47</sup> the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, 1973; the Convention on the Physical Protection of Nuclear Material, 1980; the Arab Convention on Judicial Cooperation, 1983; the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984; the Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, 1988; the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, 1988; the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf, 1988; and the International Convention against the Recruitment, Use, Financing and Training of Mercenaries, 1989.

15. Qatar has also ratified the following bilateral agreements: the Agreement on Security Cooperation and the Extradition of Criminals with the Kingdom of Saudi Arabia, 1982; the Memorandum of Understanding on Security Cooperation with the French Republic, 1996; and the Agreement on Security Cooperation with the Republic of Yemen, 2000.

16. Finally, Qatar has signed the following bilateral agreements: the Memorandum of Understanding between the Ministry of the Interior of the State of Qatar and the Ministry of the Interior of the Islamic Republic of Iran on Combating Narcotics and Psychotropic Agents, 1999; and the Memorandum of Understanding on Security Cooperation and Coordination between the Ministry of the Interior of the State of Qatar and the Ministry of the Interior of the United Arab Emirates.

### **Thailand**

17. International treaties by which Thailand is bound without any reservation to limit the application of the obligation to extradite or prosecute (*aut dedere aut judicare*) could be set out in two main groups, namely: (a) in relation to offences relating to hijacking: the Convention on Offences and Certain Other Acts Committed on Board Aircraft, Tokyo, 1963;<sup>48</sup> Convention for the Suppression of Unlawful Seizure of Aircraft, The Hague, 1970; and the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, Montreal, 1971; and (b) in relation to narcotic drug offences: the Single Convention on Narcotic Drugs, 1961, as amended by the 1972 Protocol; and the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988.

<sup>47</sup> United Nations, *Treaty Series*, vol. 1015, No. 14861.

<sup>48</sup> *Ibid.*, vol. 704, No. 10106.

**United Kingdom<sup>49</sup>**

18. The United Kingdom is party to the following treaties containing the obligation to extradite or prosecute; the Geneva Conventions of 1949; the Convention for the Suppression of Unlawful Seizure of Aircraft, The Hague, 1970; the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, Montreal, 1971; the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, New York, 1973; the European Convention on the Suppression of Terrorism, Strasbourg, 1977; the International Convention against the Taking of Hostages, New York, 1979; the Convention on the Physical Protection of Nuclear Material, 1980; the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, New York, 1984; the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Vienna, 1988; the Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Montreal Convention, 1988 (Montreal Protocol); the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, 1988 (Maritime Safety Navigation Convention); the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf, 1988; the Convention on the Safety of United Nations and Associated Personnel, New York, 1994; the International Convention for the Suppression of Terrorist Bombings, New York, 1997; the International Convention for the Suppression of the Financing of Terrorism, New York, 1999; the United Nations Convention against Transnational Organized Crime, New York, 2000; the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, 2000, supplementary to the United Nations Convention against Transnational Organized Crime; the Protocol against the Smuggling of Migrants by Land, Sea and Air, 2000, supplementary to the United Nations Convention against Transnational Organized Crime; and the United Nations Convention against Corruption, New York, 2003.

19. The United Kingdom also noted that it is party to the Convention on the Prevention and Punishment of the Crime of Genocide, 1948<sup>50</sup> and the Convention on Offences and Certain Acts Committed on Board Aircraft, 1963.<sup>51</sup> These conventions did not contain an obligation to extradite or prosecute, but required States to establish jurisdiction in respect of other offences.

20. The United Kingdom has also signed but not yet ratified the Protocol amending the European Convention on the Suppression of Terrorism;<sup>52</sup> and the International Convention for the Suppression of Acts of Nuclear Terrorism, 2005.<sup>53</sup>

<sup>49</sup> The United Kingdom noted that its response does not address issues and/or cases regarding the European Arrest Warrant which has extradition implications for participating States.

<sup>50</sup> United Nations, *Treaty Series*, vol. 78, No. 1021.

<sup>51</sup> *Ibid.*, vol. 704, No. 10106.

<sup>52</sup> European Treaty Series No. 190.

<sup>53</sup> General Assembly resolution 59/290 of 13 April 2005.

**B. Domestic legal regulation adopted and applied by a State, including constitutional provisions and penal codes of criminal procedures, concerning the obligation to extradite or prosecute**

**Austria**

21. Austria noted that the relevant Austrian legislation has been summarized by Special Rapporteur Zdzislaw Galicki in paragraph 44 of his preliminary report (A/CN.4/571).

**Croatia**

22. The Law on International Legal Assistance in Criminal Affairs<sup>54</sup> provides that when an extradition from the Republic of Croatia is not permissible, a national judicial body may, at the request of a foreign judicial body, take over criminal prosecution for an offence committed abroad.<sup>55</sup> The Law does not make extradition conditional upon the existence of an extradition agreement with the requesting State and, consequently, it does not require the implementation of the *aut dedere aut judicare* principle, but in such a case reciprocity is required, i.e. the request will be granted if on the basis of the assurances presented by the requesting State it can be expected that this State would grant a comparable request made by a Croatian judicial body.

**Monaco**

23. Monaco provided the national legislation No. 1222 of 28 December 1999 on extradition.<sup>56</sup> This law establishes a general legal framework for extradition procedure and it applies in the absence of a treaty or of a specific provision in that regard. The application of the principle *aut dedere aut judicare* is closely linked with the various grounds of refusal of extradition on which the requested State can rely upon. Article 6 of the Law 1222 is fundamental in this regard as it provides that extradition may be refused if the offence for which extradition is requested has been committed in Monaco, or is prosecuted in Monaco, or has been already judged in a third State. Article 6 also provides for refusal when the offence for which extradition is requested is subject to a capital penalty in the legislation of the requesting State, or when the alleged offender may be subject to treatment harming physical integrity.

24. These limitations are consistent with provisions of national legislation establishing the jurisdiction of the Courts of Monaco on criminal matters (articles 7 to 10 of the Code of Penal Procedure).

25. The principle *aut dedere aut judicare* is implemented when extradition is refused because of the nationality of the alleged offender. Article 7 of Law 1222 provides that the Principality of Monaco does not extradite its own nationals. However, when the refusal of extradition is based on the nationality of the person requested, upon request of the requesting State, the case is transmitted to the Prosecutor General who may prosecute the person if necessary. The conditions of application of the principle are that the requesting State has to demand that the

<sup>54</sup> Official Gazette of the Republic of Croatia /NN/178/04, in effect since 1 July 2005.

<sup>55</sup> Chapter IV — article 62 — Takeover and cession of prosecution.

<sup>56</sup> The full texts in their original French version are available for consultation at the Codification Division of the Office of Legal Affairs of the United Nations.

person should be tried, and that it transmits all the documents, information and relevant evidence regarding the offence. Thereafter, the requested State is under the obligation to inform the requesting State of the follow-up of the demand.

26. Article 7 of the Law 1222 is not deemed to suppress the power of the Prosecutor of Monaco to decide on the opportunity to prosecute, except when such an obligation results directly from international treaties, as for example, the agreements between Switzerland and Monaco or from other multilateral treaties.

27. When extradition is refused on other grounds, *inter alia*, when the offence has a military, political or fiscal nature, or when the offence has been definitively prosecuted and judged in Monaco, or when the offence, or its prosecution is limited by statute under Monegasque legislation or under the legislation of the requesting State, the principle *aut dedere aut judicare* will be applied only when the Courts of Monaco have jurisdiction on foreigners for offences committed abroad, as established by articles 7 to 10 of the Code of Penal Procedure.<sup>57</sup>

28. Finally, article 265 (5) of the Penal Code, extends the jurisdiction of Monegasque Courts regarding the organization or the facilitation of sexual exploitation of minors (18 years old) committed inside or outside the territory of Monaco.

#### **Qatar**

29. The Qatari Code of Criminal Procedures promulgated by Act No. 23 of 2004, contains a chapter, comprising articles 408 to 424, which is devoted to the question of accused and convicted persons. The most important provisions are the following:<sup>58</sup>

“(a) Article 409: It is a prerequisite for the extradition of persons:

<sup>57</sup> Article 7 of the Code of Penal Procedure: “The following parties can be prosecuted and sentenced in the Principality:

- An alien who has, outside the territory of the Principality, committed a crime against State security, counterfeited national legal tender, national identification documents or currency, either paper or other, which has entered State coffers, or who has committed a crime or offence against agents, diplomatic or consular premises or property of Monaco,
- An alien who is the co-perpetrator of or accomplice to any crime committed outside the territory of the Principality by a Monegasque who is being prosecuted or has been sentenced in the Principality for the crime in question.”

Article 8: “The following parties can be prosecuted and sentenced in the Principality:

- Any person who is an accomplice on the territory of the Principality to a crime or offence committed abroad, if the issue of complicity is provided for in both the relevant foreign law and in Monegasque law, on the condition that the main act has been certified by a definitive decision of the foreign jurisdiction,
- Anyone who commits acts outside the territory of the Principality qualified as crimes or offences constituting torture as defined in article 1 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted at New York on 10 December 1984, if he or she is found to be in the Principality.”

Article 9: “An alien can be prosecuted and sentenced in the Principality if he or she has committed one of the following outside its territory:

- a crime or offence against a Monegasque,
- a crime or offence against another alien, if the alien is found in the Principality in possession of items acquired through the commission of the violation.”

<sup>58</sup> The translation from the Arabic original version has been made by the Secretariat of the United Nations.

“– That the offence for which extradition is requested has been committed within the territory of the State requesting the extradition or has been committed outside the territory of the State of Qatar and the State requesting the extradition, provided that the act is punishable under the laws of the requesting State if committed outside its territory;

“– That the offence is a felony or misdemeanour punishable under both Qatari law and the law of the State requesting the extradition by a custodial penalty of at least two years or a more severe penalty, or that the person whose extradition is requested on the grounds of such offence has been sentenced to imprisonment for a term of at least six years;

“If the act is not punishable under the laws of the State of Qatar, or the penalty established for the offence in the State requesting the extradition has no equivalent in the State of Qatar, extradition shall not be compulsory unless the person whose extradition is requested is a national of the State requesting the extradition or a national of another State that establishes the same penalty;

“If extradition is requested for more than one offence, extradition shall be permissible only with regard to those offences which satisfy the conditions set forth above.

“(b) Article 410: Extradition is not permissible in the following cases:

- “(1) If the person whose extradition is requested is a Qatari national;
- “(2) If the offence for which extradition is requested is a political offence or is connected with a political offence, or the person whose extradition is requested is a beneficiary of political asylum at the time of submission of the request for extradition;
- “(3) If the offence for which extradition is requested is limited to breaches of military obligations;
- “(4) If there exist serious grounds for believing that the extradition request was submitted for the purpose of trying or punishing the person on the basis of considerations relating to race, religion, nationality or political views, or the existence of any such consideration is likely to be detrimental to the position of the person whose extradition is requested;
- “(5) If the person whose extradition is requested has already been tried for the same offence, a judgement has been handed down and he has satisfied his penalty, or the criminal action or the penalty has expired or become null and void owing to the passage of time or the granting of pardon in accordance with Qatari law or the law of the State requesting the extradition;
- “(6) If Qatari law permits the trial of the person whose extradition is requested before the judicial authorities in Qatar for the offence for which extradition is requested.”

30. Moreover, some provisions of the Qatari Penal Code of 2004 apply to international terrorist offences. Article 17 provides as follows:

"The provisions of this Code apply to anyone present in the State after having committed abroad, whether as principal or accessory, any crime of trafficking in drugs or in persons or any international crime of piracy or terrorism."

31. And, according to article 18 of the said Code:

"Any Qatari who, while outside Qatar, commits an act considered hereunder as a felony or a misdemeanour shall be punished in accordance with the provisions of this Code if he returns to Qatar and the act is punishable under the law of the country in which it was committed."

On the basis of the foregoing, the Penal Code subjects all persons (Qataris, residents and foreigners), if they are present in the State, to the jurisdiction of the Qatari courts with regard to specific offences, including international terrorism, whether committed inside or outside Qatar.

32. Furthermore, there is also the Act No. 28 of 2002 on combating money-laundering, with article 17 providing:

"The crime of money-laundering is one of the offences that permit of legal assistance, coordination, mutual cooperation and extradition of offenders under the provisions of agreements concluded or acceded to by the State."

33. Finally, article 57 of the Permanent Constitution of the State of Qatar provides as follows:

"The extradition of political refugees is prohibited, and the law stipulates the conditions governing the granting of political asylum."

#### **Thailand**

34. The Act on Measures for the Suppression of Offenders in an Offence relating to Narcotics of 1991 was enacted to implement the conventions relating to narcotic drug offences to obligate Thailand to grant extradition upon the basis of these multilateral treaties where the obligation to prosecute or extradite (*aut dedere aut judicare*) is operated.

#### **United Kingdom**

35. The United Kingdom does not have any specific legal regulations concerning the obligation to extradite or prosecute. Section 193 of the Extradition Act of 2003 allows the United Kingdom to extradite for trial when requested by another party to an international convention and where the conduct in question is covered by the provisions of that convention.

36. The United Kingdom has several statutory provisions establishing jurisdiction for specified crimes, thus enabling the relevant national authorities to prosecute offences. Implementing legislation for the international treaties by which the United Kingdom is bound includes: the Geneva Conventions Act of 1957; the Part I of the Aviation and Security Act of 1982; the Internationally Protected Persons Act of 1982; the Suppression of Terrorism Act of 1978; the Taking of Hostages Act of 1982; the Nuclear Material (Offences) Act of 1983; Section 134 of the Criminal Justice Act of 1988; Section 21 of the Criminal Justice (International Cooperation) Act of 1990; the Parts I and II of the Aviation and Maritime Security Act of 1990;

the United Nations Personnel Act of 1997; the Part VI of the Terrorism Act of 2000; and the Chapter 15 of the Serious Organised Crime and Police Act of 2005.

**C. Judicial practice of a State reflecting the application of the obligation *aut dedere aut judicare***

**Austria**

37. The principle *aut dedere aut judicare* plays a crucial role in the Austrian practice. According to section 65 paragraph 1 no. 2 of the Austrian Penal Code, the Public Prosecutor has to examine the institution of proceedings in Austria if the extradition of a suspect cannot be granted for reasons other than the nature or characteristics of the offence.<sup>59</sup> However, the court decisions instituting proceedings in Austria following the refusal of extradition do not explicitly refer to the above-mentioned provisions. For this reason, no court decisions referring explicitly to section 65 of the Austrian Penal Code or comparable provisions can be provided. The lack of court decisions therefore does not reflect the great importance of the principle *aut dedere aut judicare* in Austrian judicial practice.

**Croatia**

38. In the criminal prosecution taken over from another State, the accused is tried as if the offence had been committed in the Republic of Croatia. However, foreign law is applicable when it is more lenient on the accused, to honour the principle that the transfer of prosecution between States must not aggravate the position of the accused. Every investigative action undertaken by a foreign judicial body under the law of the requesting State will engender a corresponding investigative action under the law of the Republic of Croatia, unless it runs contrary to the principles of the national legal order, the principles of the European Convention for the Protection of Human Rights and Fundamental Freedoms,<sup>60</sup> and the International Covenant on Civil and Political Rights.<sup>61</sup>

**Monaco**

39. Monaco courts are rigorously applying the rules contained in its law on extradition No. 1222. Monaco is committed to fight against transnational crimes in an efficient manner, and to promote the largest and the most effective international cooperation, as exemplified by the judgment of the Appeal Court, dated 12 April 2001.<sup>62</sup> In this judgment, the Appeal Court allowed the extradition of a Russian national requested by the Russian Federation for drug trafficking. In order to do so, the Court carefully applied the provisions contained in the law on extradition No. 1222, the bilateral convention between Monaco and Russia of 5 September 1888, and the provisions on extradition contained in the United Nations Convention

<sup>59</sup> See also section 17 paragraph 3 of the Federal Law on judicial cooperation in penal matters with the Member States of the European Union, Federal Law Gazette I No. 36/2004, implementing the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, OJ L 190, 18.7.2002, p. 1.

<sup>60</sup> European Treaty Series No. 5.

<sup>61</sup> General Assembly resolution 2200 A (XXI).

<sup>62</sup> The judgment dated 12 April 2001 in its original French version is available for consultation at the Codification Division, Office of Legal Affairs of the United Nations.

against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, of 20 December 1988, to which the Russian Federation and Monaco are both parties. It concluded that the extradition request by the Russian Federation fully complied with the procedural and substantive requirements provided in those instruments, namely, the request had been transmitted through diplomatic channel, the judge had ascertained the identity of the person arrested and notified to him the extradition procedure, an interpreter was present during the hearing, all relevant documents had been duly translated, and his arrest had been made lawfully. Furthermore, the grounds for the request of extradition were contained in the United Nations Convention of 1988 and therefore, were deemed included in the extradition convention between Monaco and Russia of 5 September 1888. Moreover, there was no other basis to refuse such an extradition as the offence did not have any military, fiscal, or political nature, it was not prosecuted in Monaco courts; it was not covered by any statute of limitations. Finally, the asylum request made by the suspect could not become a ground to refuse extradition in the view of the gravity of the alleged offence.

40. Meanwhile, no specific judgment concerning the direct application of the principle *aut dedere aut judicare* has been identified.

#### **Thailand**

41. Thailand indicated "no" in response to the question regarding judicial practice.

#### **United Kingdom**

42. The nature of the obligation to extradite or prosecute was discussed in the litigation surrounding the extradition of General Pinochet: see *Bartle and the Commissioner of Police for the Metropolis and Others; ex-parte Pinochet* [2000] 1 AC 61; *Bartle and the Commissioner of Police for the Metropolis and Others; ex-parte Pinochet* [2000] 1 AC 147; and in *T v Secretary of State for the Home Department* [1996] AC 742 (per Lord Mustill).

43. The United Kingdom extradites individuals (including British nationals) where there is a request for extradition and provided that the extradition is not barred for other reasons (for example, human rights considerations). Most recent cases have concerned terrorism offences.

44. The United Kingdom has recently prosecuted an individual for alleged instances of torture and hostage-taking occurring in Afghanistan in *R v Zardad*. Certain aspects of the decision are currently subject to appeal.

### **D. Crimes or offences to which the principle of the obligation *aut dedere aut judicare* is applied in the legislation or practice of a State**

#### **Austria**

45. With regard to the obligation *aut dedere aut judicare*, the Austrian legislation does not distinguish between certain categories of crimes or offences. Therefore, all crimes and offences punishable under the Austrian Penal Code are subject to this

obligation as laid down in sections 64 and 65 of the Austrian Penal Code (see A/CN.4/571, para. 44).

#### **Croatia**

46. The *dedere* obligation only applies to the so-called extraditable offences, determined or determinable as such in an international agreement. If there is no such agreement between the requesting State and the Republic of Croatia, the Croatian Law on International Legal Assistance in Criminal Affairs is applied. The Law provides that extradition for criminal prosecution may be granted for criminal offences that are punishable under Croatian law by a prison term or a security measure including deprivation of liberty of a minimum period of one year, or by a more severe punishment. Should the extradition not be permissible for this reason, it shall not prevent a takeover of the prosecution ("*...aut judicare*"). Therefore, the obligation *aut dedere aut judicare* is applicable to all criminal offences.

#### **Japan**

47. In the Japanese judicial system, the obligation to extradite or prosecute stipulated by the treaties listed in section II.A, is implemented on the basis of the Law of Extradition, the Penal Code<sup>63</sup> and other related laws and regulations.

#### **Monaco**

48. Following articles 7 to 10 of the Code of Penal Procedure, the principle *aut dedere aut judicare* may be implemented in various cases, including crimes against the State security, counterfeiting, crime or offence against diplomatic, consular or national premises, and torture.

#### **United Kingdom**

49. The United Kingdom applies the principle "extradite or prosecute" to the following crimes: torture, hostage-taking, certain offences against civil aviation and maritime safety, and specified terrorist offences.

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<sup>63</sup> Unofficial translations of the Penal Code and the Law of Extradition provided by Japan are available for consultation at the Codification Division, Office of Legal Affairs of the United Nations.

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**Fourth report on shared natural resources:  
transboundary groundwaters**

**by Mr. Chusei Yamada, Special Rapporteur**

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## I. Introduction

1. The International Law Commission, at its fifty-fourth session in 2002, decided to include the topic "Shared natural resources" in its programme of work.<sup>1</sup> It proceeded with the examination of the topic based on the three reports (A/CN.4/533 and Add.1, A/CN.4/539 and Add.1 and A/CN.4/551 and Corr.1 and Add.1) submitted by the Special Rapporteur, who proposed a step-by-step approach to the topic beginning with transboundary groundwaters. The Commission, at its fifty-eighth session in 2006, adopted on first reading draft articles on the law of transboundary aquifers consisting of 19 draft articles, together with commentaries thereto.<sup>2</sup> It also decided to transmit the draft articles, through the Secretary-General, to Governments for comments and observations, with the request that such comments and observations be submitted to the Secretary-General by 1 January 2008.<sup>3</sup>

2. In the debate on the report of the Commission on the work of its fifty-eighth session held in the Sixth Committee during the sixty-first session of the General Assembly in 2006, delegations welcomed the completion of the first reading of the draft articles on the law of transboundary aquifers and made their comments and observations<sup>4</sup> on all aspects of the draft articles and the commentaries thereto and on final form of the draft articles as requested by the Commission.<sup>5</sup> The Special Rapporteur wishes to defer the examination of these comments and observations until January 2008, when he will have received further written submissions from Governments.

3. There is, however, one aspect that the Commission needs to address at its fifty-ninth session in 2007. That is the aspect concerning the future work on the topic "Shared natural resources", in particular the relationship between the work on groundwaters, on one hand, and the work on oil and natural gas, on the other hand. The Commission decided to focus on transboundary groundwaters for the time being but the question of oil and natural gas was raised by some members from time to time. In response to the queries from those members, the Special Rapporteur clarified his position in his summing up of the debate in 2005 that due attention should be given to the question of oil and natural gas before consideration of the second reading of the draft articles on the law of transboundary aquifers was completed because the proposed measures relating to aquifers might have implications for the future work of the Commission on oil and natural gas and conversely current State practice and norms relating to oil and natural gas might also have implications for the work of the Commission on aquifers (see A/CN.4/SR.2836). The Working Group on Shared Natural Resources, which was established to consider substantive elements of the draft articles on transboundary

<sup>1</sup> *Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 10 and corrigendum (A/57/10 and Corr.1)*, para. 518.

<sup>2</sup> *Ibid.*, *Sixty-first Session, Supplement No. 10 (A/61/10)*, paras. 75 and 76.

<sup>3</sup> *Ibid.*, para. 73. See also General Assembly resolution 61/34, paras. 2 (c) and 5.

<sup>4</sup> *Official Records of the General Assembly, Sixty-first Session, Summary records of the Sixth Committee. A/C.6/61/SR.13-16, 18 and 19; and Topical summary of the discussion held in the Sixth Committee of the General Assembly during its sixty-first session, prepared by the Secretariat (A/CN.4/577)*.

<sup>5</sup> *Official Records of the General Assembly, Sixty-first Session, Supplement No. 10 (A/61/10)*, para. 26.

aquifers, informally requested the Special Rapporteur to present a preliminary study on oil and natural gas to the Commission at its fifty-ninth session in 2007.

4. During the debate held in the Sixth Committee in 2006, delegations also commented on future work on the topic "Shared natural resources" (see A/CN.4/577, para. 24). Some delegations were of the view that once the Commission had completed its codification on groundwaters, it should turn its attention to the other shared natural resources such as oil and natural gas,<sup>6</sup> while some others called on a decision on future work to be made only after the completion of the draft articles on transboundary aquifers, expressing concern regarding the complexity of taking up oil and gas<sup>7</sup> or doubting the need for universal rules relating oil and natural gas.<sup>8</sup> Yet another delegation called on the Commission to commence its consideration of other transboundary resources during the second reading of the draft articles on the law of transboundary aquifers, expressing the view that the Commission would be foregoing the opportunity to develop an overarching set of rules for all shared natural resources.<sup>9</sup>

5. The question of oil and natural gas requires extensive studies not only on scientific and technical aspects but also on political and economic aspects. However, the current task of the Commission is limited to ascertaining whether it is appropriate for the Commission to proceed with the second reading of the draft articles on the law of transboundary aquifers independently from the work on oil and natural gas. For such purpose, the study could be rather brief. The present report is only intended to assist the Commission in making the required decision on the future work on transboundary aquifers.

## II. Oil and natural gas

6. An oil or natural gas field is developed where a hydrocarbon accumulation has been discovered which is capable of producing a sufficient quantity of oil and/or natural gas for commercial purposes. The origin of oil and natural gas (petroleum) has been debated for many years. There were opposing theories. The first of them has assumed that the source material was inorganic. The second has argued that petroleum was derived from former living organisms. It seems that the second, in particular, the kerogen origin theory, now prevails. According to this theory, living organism (animal and plant) that was piled up at the bottom of ocean and lake has fossilized and formed, together with sediment, material termed as "kerogen". With the effect of bacteria, geothermal heat and underground pressure, kerogen turns into petroleum and residual water. Owing to underground pressure, petroleum and water moves upward through rock formation until it reaches cap rock which is less permeable. These are stored in the pores of the "reservoir rock". The reservoir rock is the geological formation, which usually consists of sands, sandstones or various kinds of limestone. Within the reservoir rock, petroleum and water are distributed vertically in the order of their densities. Natural gas is in the upper zone and oil in the lower zone when both oil and natural gas exist. Water is in the bottom zone.

<sup>6</sup> Mexico, Portugal, Poland, Indonesia and Greece.

<sup>7</sup> United States of America, United Kingdom of Great Britain and Northern Ireland and Russian Federation.

<sup>8</sup> Russian Federation.

<sup>9</sup> The Netherlands.

However, the gas zone is not sharply separated from the oil zone, while there is a transition zone between the oil and water zones, or between the gas and water zones in the absence of oil. The reservoir rock is usually of marine origin and the waters stored therein are termed "brine", which is salt water.

7. The process of formulation and accumulation of hydrocarbons as described in paragraph 6 above occurred over periods of hundreds of millions of years. That process may also be taking place today. However, for all practical purposes, any current recharge of hydrocarbons in existing oil fields is negligible. Accordingly, oil and natural gas should be considered as non-renewable resources.

8. The cap rock which overlies the reservoir rock functions as a seal that prevents further upward movement of oil and natural gas. And oil and natural gas are stored in reservoir rock under pressure, usually higher than atmospheric pressure. When a well is drilled through cap rock, oil and natural gas shoot up.

9. In the history of mankind, oil had been obtained in small quantities for many centuries from surface seepages. But it was not until 1859 that the modern oil industry was born when E. L. Drake successfully drilled the first oil well in Pennsylvania. The well produced only 30 barrels per day from a depth of 69 feet. With the development of exploration and production technology, such as seismic surveys and drilling techniques for several thousand metres, on one hand, and the rapidly growing demand for various uses on the other, petroleum production has increased by leaps and bounds in almost every continent and also on continental shelves. It is now taking place within the jurisdiction of more than 70 States and reached the level of 71.8 million barrels per day in the year 2005. Petroleum is the one of the most important energy resources and is also the raw material for various petrochemical products. Petroleum and its by-products are now internationally traded widely and in large quantity. Petroleum production and its trade have significant implication for the world economy and international politics.

10. In general, States or their political subdivisions retain the right to lease oil fields under their jurisdiction. Petroleum is explored, produced and traded by private oil companies or State enterprises. Activities of State enterprises in this context would be deemed to be of a commercial nature under current international law.<sup>10</sup>

11. It seems that transboundary oil fields exist in many parts of the world, in particular on continental shelves. As oil and natural gas are fluid, exploitation of such an oil field by one party may affect other parties in another jurisdiction sharing the same oil field. Information on this aspect is not readily available, however, and extensive research would be required in the future.

12. The problem of pollution itself of oil and natural gas stored in reservoir rock by exploitation seems to be minimal. On the other hand, the exploitation of an oil field and transportation of petroleum have a risk of causing a significant harm to the marine environment. Uses of petroleum as an energy source are emitting tremendous amounts of greenhouse effect gases and may be a major contributing factor to global warming. Waste disposal of petrochemical products is also causing environmental problems.

<sup>10</sup> United Nations Convention on Jurisdictional Immunities of States and Their Property; see General Assembly resolution 59/38 of 2 December 2004, annex.

### **III. Relationship between the work on groundwaters and that on oil and gas**

13. As oil and natural gas often coexist in the same reservoir rock, they should be treated as one resource for the purpose of the work of the Commission. The reservoir rock and the natural condition of the oil and natural gas stored therein are almost identical to a non-recharging and confined aquifer. But the similarity between groundwaters on one hand and oil and natural gas on the other ends there.

14. Groundwater is the life-supporting resource of mankind and there exists no alternative resource. While oil and natural gas are important resources, they are not essential for life and there are various alternative resources. The consideration of vital human needs does not arise here. Survey and extraction of groundwaters take place on the land. A substantial part of survey and production of oil and natural gas takes place on the sea within the outer limits of continental shelves. Oil and natural gas are commercial commodities and their values are more or less determined by market forces. Groundwater is not internationally traded, with a few exceptional cases, and its value is determined by the social considerations of each community. The consideration of environmental problems of oil and natural gas requires an entirely different approach from that of groundwaters.

15. The Special Rapporteur considers that some of the regulations of the law of the non-recharging transboundary aquifer might be relevant to the question of oil and natural gas. Nevertheless, the majority of regulations to be worked out for oil and natural gas would not be directly applicable to groundwater. It means that a separate approach is required for oil and gas. If we try to link the work on groundwaters with the work on oil and natural gas, it would result in undue delay of the completion of the work on groundwaters. It is therefore the view of the Special Rapporteur that the Commission should proceed with and complete the second reading of the law of transboundary aquifers independently from its future work on oil and natural gas.